Supreme Court, U.S.
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No. 01-743

In The

Supreme Court of the United States

MICHAEL W. CROCKETT,

Petitioner,

vs.

JOHN SHIELDS, MARK FRENCH, LARRY MOCK, PETER CARDER, ROBERT MASKO, and JAMES ANDREWS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether the Court should review an unpublished circuit court decision affirming dismissal of a malicious prosecution claim against investigating police officers where the prosecution was initiated by a prosecuting attorney who was fully informed of the allegedly exculpatory evidence and who independently exercised her judgment in instituting the criminal charges.

(2) Whether the Court should review an unpublished circuit court decision that evidence presented at trial was not sufficient to support a verdict for the plaintiff on a First Amendment free speech claim.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents John Shields, Mark French, Larry Mock, Peter Carder, Robert Masko and James Andrews, through their attorneys, oppose the petition for writ of certiorari of the United States to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

A. Factual History

1. Introduction

Petitioner Michael Crockett's claims arose out of his employment as a sergeant in the Pierce County Sheriff's Department ("Sheriff's Department"). Petitioner was experiencing supervisory and disciplinary problems, and feared he might lose his job. In an effort to protect his job, he wrote an anonymous letter to the Pierce County Council alleging criminal misconduct by two of his supervisors who were candidates for the position of Pierce County Sheriff. When it was learned that he had written the letter, the new sheriff (who was not criticized in Petitioner's letter) disciplined but did not discharge Petitioner.

Six months later a new matter arose. The Sheriff's Department received a citizen's report alleging that Petitioner had sexually assaulted a woman who was residing in a basement apartment in his house. The Sheriff's Department conducted internal and criminal investigations of the allegations. Petitioner was prosecuted by the Pierce County Prosecuting Attorney. Then-sheriff John Shields also decided to take new disciplinary action

against Petitioner as a result of his misconduct toward the woman.

2. Personnel Disputes Leading up to Petitioner's Alleged Protected Speech.

Petitioner was hired by the Pierce County Sheriff's Department ("Sheriff's Department") as a deputy in January 1977. He became a temporary sergeant in 1986 and a full-time sergeant approximately two years later. As a sergeant, he gained a low-level supervisory role over other deputies, and problems arose between Petitioner and the deputies under his supervision.

These problems first came to the attention of higher management at Pierce County in early 1991, when an African American female deputy complained about Petitioner's conduct toward her. The deputy alleged Petitioner had harassed her because of her sex and race, used offensive references to African Americans, and expressed the opinion that women did not belong as patrol officers.

The Sheriff's Department investigated the allegations. The investigator concluded that some of the allegations were sustained, but that other allegations were not. The investigation also revealed that the Petitioner had significant difficulties not only with the complaining deputy, but also with many of the other deputies whom Petitioner supervised.

Respondent Mark French, who was Petitioner's captain at the time, reviewed the investigation's findings. French recommended that Petitioner receive an oral reprimand and that he attend additional supervisory, cultural awareness and race/sex discrimination training. On May 29, 1991, Petitioner received a letter of reprimand from then-Chief of Operations Steve Poythress and then-

Sheriff Chuck Robbins for making racially and sexually biased statements.

In addition to his relationship problems with the deputies he supervised, Petitioner had other conduct problems, including watching television while on duty, and being stopped by the Washington State Patrol for exceeding the speed limit by 53 miles per hour while off duty.

Petitioner acknowledged his difficulties with deputies he supervised and with his superiors, including French. He described a "constant" and "running" dispute with French from the time he became a sergeant.

As a result of these and earlier criticisms, Petitioner believed that French and Poythress wanted to fire him.

3. The Anonymous Letter.

In 1992, French and Poythress, among others, were each being considered by the Pierce County Council to become sheriff in place of the retiring Sheriff Chuck Robbins. In an effort to prevent either of these two from being appointed sheriff, Petitioner drafted an anonymous letter on Sheriff's Department stationary addressed to members of the Pierce County Council. The letter alleged that Poythress had previously assaulted a pro-tem judge, and that French had used cocaine and beat up his former wife, and that these events had been covered up. The allegations Petitioner made against French were totally false.

Petitioner has admitted that he had no personal knowledge or evidence that any of these allegations were true. He further admitted that he was worried for his job if French or Poythress became sheriff. He admitted this letter was motivated by a concern for protecting his job.

Petitioner was afraid that if either one became sheriff, he would lose his job.

Shortly after he wrote the letter, Petitioner admitted that he was the author. The newly-appointed sheriff, Respondent John Shields, disciplined Petitioner with a fifteen-day suspension and some lesser sanctions including a requirement that he apologize for his conduct and write an ethics paper. Petitioner's employment was not terminated because of the letter, and it is undisputed that his employment continued.

4. The "Black Box" Investigation.

In the summer of 1992, Petitioner heard reports that some deputies in the Sheriff's Department were using and/or selling cable TV descramblers ("black boxes"). Petitioner passed this report on to his superiors, who ordered an internal affairs investigation. Petitioner was not involved in the investigation. Some deputies were disciplined as a result of this investigation. Contrary to Petitioner's assertion, there was no evidence that any of the Respondents in this action were involved in the alleged activities. No employment action was taken against Petitioner for his role in reporting this problem.

5. The Criminal Complaint, Investigation and Prosecution.

Cheryl Hulsey was a tenant residing in the basement of Petitioner's home. On September 26, 1992, Ms. Hulsey reported that Petitioner had come up behind her and fondled her, and that when she resisted his advances, he threatened her and spanked her. She called a friend, who in turn called the police.

The Sheriff's Department conducted a criminal investigation of the complaint. Respondent James Andrews was the detective primarily in charge of the investigation. Respondent Robert Masko assisted Andrews. Andrews' direct supervisor was Respondent Peter Carder.

The detectives interviewed witnesses, carried out a search warrant and reported the information they obtained to prosecuting attorney Barbara Corey-Boulet. Because an officer was involved, Carder also attended this meeting. The officers explained to the prosecutor what information they had, but did not make any recommendation as to whether charges should be filed. Prosecutor Corey-Boulet filed criminal charges on September 30, 1992.

As part of the criminal proceedings, the prosecution made a motion and affidavit for the determination of probable cause. An arraignment and hearing was held on October 2, 1996, at which time the court made a finding that there was probable cause to believe Petitioner committed the offense and imposed conditions on his release. Petitioner did not contest the finding of probable cause at this or any other time during the criminal proceedings.

6. The Internal Affairs Investigation.

Internal Affairs also investigated the Hulsey complaint for possible disciplinary purposes. The investigation was standard procedure of the Sheriff's Department whenever the department received a complaint of misconduct regarding its personnel. Respondent Mock was the inspector who conducted the internal affairs investigation. As a result of his investigation, Respondent Mock concluded Petitioner had violated policies of the Sheriff's Department Manual, including failing to obey all laws,

failing to keep his life unsullied and not protecting the rights of individuals. Sheriff Shields reviewed the investigation findings and determined that Petitioner should not continue as a law enforcement officer. Shields believed that Petitioner's conduct towards Hulsey made it impossible for him to continue as a law enforcement officer, regardless of whether there was sufficient evidence for a criminal conviction.

7. The Process and "Termination" of Petitioner's Employment.

The Sheriff's Department began the notice proceedings necessary to discharge Petitioner. Petitioner was given repeated notices of the Sheriff's intent to terminate his employment over the Hulsey incident and notice of the specific Sheriff's Department policy provisions he was believed to have violated. Meetings were set up for Petitioner to respond. However, Petitioner did not appear at any of these pre-disciplinary meetings.

Instead of challenging the allegations against him in the personnel hearings, Petitioner focused his efforts on obtaining a disability retirement under the State of Washington's Law Enforcement Officers' and Fire Fighters' Retirement System Act (LEOFF I). Petitioner was successful in obtaining a disability retirement based on a mental disability, which was retroactively made effective as of the date he made his application. Petitioner's disability retirement effectively made the discharge proceedings moot. Petitioner's retirement benefits are equivalent to a taxable income of approximately $50,000.00 per year, and continue for life.

On October 16, 1992, Sheriff Shields signed a personnel order terminating Petitioner's employment and sent

Petitioner a letter explaining his reasons. This order was subsequently obviated when Petitioner later obtained a disability retirement dating back to October 2, 1992. The present litigation followed.

B. Procedural History.

Petitioner brought the instant action under 42 U.S.C. Section 1983 based upon alleged violations of his First Amendment right of free speech and his Fourteenth Amendment right to Due Process, and conspiracy under 42 U.S.C. Section 1985. Petitioner also alleged malicious prosecution. The Respondents are the detectives who performed the criminal investigation of the sexual assault complaint (Respondents Andrews and Masko), the supervisor of the detective unit that conducted the criminal investigation (Respondent Carder), the officer who performed an internal affairs investigation of the rape complaint (Respondent Mock), and Petitioner's supervising officers (Respondents Chief French and Sheriff Shields).

Respondents brought a summary judgment motion to dismiss all of Petitioner's claims. The District Court granted summary judgment and dismissed Petitioner's Due Process, conspiracy and malicious prosecution claims. As to the First Amendment free speech claim, the Respondents withdrew their request for summary judgment. Contrary to Petitioner's assertion, the District Court did not make any finding that an issue of fact existed on this claim. Rather, Respondents agreed that, at that point in the case, a determination of whether the anonymous letter was protected speech required an evidentiary hearing on the facts and context surrounding the letter.

The trial began on March 22, 1999. At the close of Petitioner's case, Respondents moved for judgment as a matter of law. The District Court granted the motion in part by dismissing Petitioner's free speech claims against all Respondents except Chief French. The trial continued against French alone.

Petitioner's First Amendment claim against French was based on the anonymous letter he had written criticizing French and Poythress. At trial, Petitioner conceded that he had no personal knowledge of the veracity of the accusations he had made in his anonymous letter. He also conceded that he knew these allegations had previously arisen and, following an investigation, had been determined to be false.

Petitioner's evidence in support of his claim primarily concerned events that occurred before he had written the anonymous letter. The only evidence that Petitioner presented regarding events occurring after the letter was: the investigation into who wrote the letter; the disciplinary procedures (e.g., notice of proposed discipline, opportunity to respond); and the discipline/work contract that was ultimately assessed. The evidence was uncontroverted that French did not participate in the investigation of the letter and that he did not participate in the interview of Petitioner or the recommendations for his discipline. The evidence showed only that French shared his supervisor's file with an investigator, a file which is normally considered when making disciplinary decisions. There was no evidence that this act had any effect whatsoever on the disciplinary action that was ultimately taken by the Sheriff. Indeed, the only evidence

in this regard was Sheriff Shields' uncontroverted testimony that French had absolutely no role in his decision to discipline Petitioner.

The jury returned a verdict in favor of Petitioner. Following the verdict, Respondent French renewed his motion for judgment notwithstanding the verdict, new trial or remittitur. The District Court granted the motion. Petitioner appealed to the Ninth Circuit.

The Ninth Circuit affirmed the District Court. In its opinion, the Ninth Circuit held that summary judgment on Petitioner's malicious prosecution claim was proper because the undisputed evidence showed that the prosecutor charged Petitioner even after learning of the allegedly exculpatory evidence. The Ninth Circuit also held that the judgment notwithstanding the verdict was proper on Petitioner's First Amendment claim against French because Petitioner offered no evidence of a causal link between his termination and the anonymous letter that he had written.

Petitioner moved for reconsideration, and the request was denied. Petitioner then filed a request for a rehearing en banc, which was also denied.

SUMMARY OF THE ARGUMENT

No reason exists for the court to exercise its discretionary jurisdiction over the present case. The Ninth Circuit's decision does not conflict with other courts and does not concern an important legal question for this Court to resolve. The Ninth Circuit's decision affirming the trial court's dismissal of Petitioner's malicious prosecution claim rests on a review of the evidence. Likewise, the Ninth Circuit's decision affirming the District Court's

grant of Respondent's judgment notwithstanding the verdict rests on its examination of the sufficiency of the evidence presented at trial. Petitioner provides no reason for the Court to re-examine the evidentiary sufficiency of these decisions.

Petitioner also argues that the District Court's decisions were erroneous and the Court should review these rulings. Petitioner's focus on the District Court is misplaced. The Supreme Court Rule that guides the Court's exercise of its discretionary jurisdiction specifically states that decisions of "United States circuit courts" are the type that the Court will generally review. Thus, the alleged errors of the District Court provide no basis for granting a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Has Failed to Set Forth Any Special Or Important Reason Why The Court Should Review The Ninth Circuit Decision.

Supreme Court Rule 10 ("Rule 10") sets forth the considerations that govern whether this Court should grant a petition for writ of certiorari. The rule provides in pertinent part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a *United States court of appeals* has entered a decision in conflict with the decision of another United States court of appeals on the

> same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) a state court or a *United States court of appeals* has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

(Emphasis added.) Certiorari will be granted only in cases involving issues that are important to the public generally, as distinguished from issues merely important to the parties, or in cases where there is a conflict of authority between the United States courts of appeal. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 95 L. Ed. 479 (1951). The Court will not grant writ of certiorari merely to review evidence or inferences drawn therefrom. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178, 58 S. Ct. 849, 82 L. Ed. 1273 (1938).

Petitioner is not seeking review to settle either an important legal question or a conflict between the different circuits of the courts of appeal. Instead, Petitioner is unsatisfied with the Ninth Circuit's and the District Court's application of settled law to the facts of this case. Petitioner is asking the Court to re-examine the record to correct alleged factual errors made by these courts.

Because of this narrow, factual focus, the Court should decline to exercise its discretionary jurisdiction in this case.

A. There Is No Reason For The Court To Review The Dismissal Of Petitioner's Malicious Prosecution Claim.

1. The Law Of Malicious Prosecution Is Clear and Well Defined; This Case Presents No Issue That Requires Further Clarification By The Court.

This matter does not present a conflict of authorities or an issue upon which the law is unclear. The legal principles underlying Petitioner's malicious prosecution claim are not contested. It is well established that an essential element of a claim of malicious prosecution is the absence of probable cause for the prosecution. *See Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995); *see also Wyatt v. Cole*, 504 U.S. 158, 165, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992). The existence of probable cause is an absolute defense to a claim of malicious prosecution. *See Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 149, 30 L. Ed. 614, 7 S. Ct. 472 (1887); *Hanson v. City of Snohomish*, 852 P.2d 295, 298 (Wash. 1993); *see also Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 63, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). The mere fact that a prosecution was unsuccessful does not mean the prosecution was not supported by probable cause. *Freeman*, 68 F.3d at 1189.

Petitioner's theory is that probable cause was lacking because the detectives investigating the criminal complaint failed to divulge exculpatory evidence to the prosecutor. *See Haupt v. Dillard*, 17 F.3d 285, 290 n. 5 (9th Cir. 1993) (a state actor who suppresses evidence may still be liable despite the finding of probable cause). The issue presented to the Ninth Circuit, and now presented to this court, is whether a question of fact existed that would have precluded summary judgment based on the evidence in the record.[1]

In its opinion, the Ninth Circuit affirmed the District Court because the undisputed facts showed that no exculpatory evidence had been withheld:

> Because the prosecuting attorney exercised independent judgment in proceeding with the criminal action against Petitioner, *even after learning of the evidence Petitioner claims exculpated him*, the officers who were involved in the investigation and arrest are immune from § 1983 liability for their actions. *Petitioner has produced no evidence that the prosecutor's judgment was not independently made, or that new exculpatory evidence surfaced after the probable cause determination*. Thus, we affirm the summary judgment dismissal of Petitioner's malicious prosecution claim.

(Petition for Writ of Certiorari, App. A, p. A-3) (emphasis added) (citation omitted). As the Ninth Circuit's opinion makes clear, the appellate court considered the evidence

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[1] Another element of a malicious prosecution is malice. Petitioner falsely states that Respondents did not dispute this element. The Respondents never conceded the existence of malice; they simply did not move for summary judgment on this ground.

to which Petitioner points. The Ninth Circuit reviewed the evidence *de novo* and concluded that the undisputed evidence showed that probable cause was established, and that Petitioner's allegations were without merit. Because of the existence of probable cause, Petitioner could not establish an essential element of his malicious prosecution claim, and summary judgment was proper.

The record supports this conclusion. The gravamen of Petitioner's argument is that he had an "ironclad alibi," namely, that he was working at the time of his alleged assault on Ms. Hulsey, and that investigators did not give this information to the prosecutor. However, the record shows that the prosecutor did in fact consider the evidence in question. The prosecutor acknowledges that she had this evidence, but she simply did not find it "ironclad":

> Q Do you recall any concern about the time during which he worked?
>
> A [Prosecutor Corey-Boulet] I am confident that we knew the time that he worked.
>
> Q And what source of information did you have on that?
>
> A The detectives said that he worked at a bank, I believe it was in Lakewood, that Saturday, and they told me what hours he'd worked.
>
> Q In their initial reports to you?
>
> A Yeah. The first time I spoke with them.

(Supplemental Excerpts of the Record ("SER"), p. 116.) The evidence showed that the prosecutor felt that the statements regarding the time were reconcilable and filed charges with knowledge of the information Petitioner contends was exculpatory. The prosecutor simply disagreed with Petitioner's assertion that this information exculpated him: "I don't think anybody disputed that he

worked at the bank when he said he worked at the bank. His hours was [sic] not the – or his hours were not the critical issue from the State's standpoint." (SER, p. 123.) Petitioner failed to present evidence that any other exculpatory information was withheld by the investigating officers.

In light of this evidence, it is undisputed that the prosecutor had the information and that she received it from investigating detectives. The prosecution of Petitioner was the result of the prosecutor's fully-informed decision to bring charges. This evidence accords with the Ninth Circuit's conclusion that the prosecutor proceeded with the criminal case against Petitioner after learning of the allegedly exculpatory evidence. Given these undisputed facts, the Ninth Circuit's decision does not conflict with any decision of this Court or any other United States circuit court because probable cause existed.

2. The Ninth Circuit Never Reached The Question Of Collateral Estoppel And The District Court's Decision Is Not A Basis For Granting Review; The District Court's Decision Does Not Conflict With The Decision Of This Or Any Other Court, But Follows Settled Precedent.

In the separate criminal proceeding against Petitioner, which arose from Hulsey's allegations, the state court determined that there was probable cause to believe he committed the charged offense. Petitioner never challenged this finding. In this case, the District Court concluded that Petitioner was collaterally estopped from relitigating the question of probable cause based on the state court's determination.

On appeal, the Ninth Circuit affirmed the District Court's dismissal of the malicious prosecution claim, but did not address the collateral estoppel issue. Nonetheless, Petitioner argues that the District Court's decision was erroneous and urges this alleged error as a reason for Supreme Court review. However, Rule 10 states that a petitioner should demonstrate how a decision of a "United States circuit court" creates a basis for granting review; Rule 10 does not include trial court decisions as a ground on which a writ of certiorari may be granted. Thus, Petitioner's entire argument regarding collateral estoppel is irrelevant to the question of whether this Court should grant certiorari because this issue was not a basis for the Ninth Circuit's decision.

Even if this Court were inclined to review a district court ruling, the present case would present no reason for the Court to grant review. Collateral estoppel is a favored doctrine because it relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources and, by preventing inconsistent decisions, encourages reliance on adjudication. *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). The doctrine's elements are well settled. *See* 18 C. *Wright, A. Miller & E. Cooper, Federal Practice and Procedure* § 4416, at 137-39 (1981); *see also Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Further, this Court has previously held that collateral estoppel may apply in situations, as here, when a plaintiff brings a Section 1983 claim based on issues previously decided in a state criminal proceeding. *See Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

Petitioner does not claim that the doctrine needs clarification, that it cannot be asserted against civil rights

plaintiffs generally, or that there is a conflict of authorities on this issue. Rather, Petitioner is unsatisfied with the District Court's application of settled law to the particular facts of this case.

In concluding that Petitioner was collaterally estopped, the District Court followed *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994). In *Haupt*, the procedural posture was the same, arising from the trial court's entry of summary judgment. The Ninth Circuit decided precisely the same issue as presented in this case and held that the plaintiff was collaterally estopped from relitigating the issue of probable cause where the plaintiff had failed to challenge a finding of probable cause in the underlying criminal prosecution. *Id.* at 289.

Petitioner is not arguing that *Haupt* was wrongly decided or otherwise questioning the legal principles underlying that decision, but contends that the present case is factually distinguishable from the situation in *Haupt*. A review of Petitioner's claim by the Court would entail comparing the specific facts of this case with those in *Haupt*. In light of this extremely narrow focus, Petitioner offers no basis for the Court to grant review.

In any case, the District Court's decision accords with this precedent. Here, as in *Haupt*, probable cause was determined to exist at a preliminary hearing shortly after the initiation of the prosecution. As in *Haupt*, the determination of probable cause was made by a judge. As in *Haupt*, Petitioner had the opportunity to contest whether probable cause existed. As in *Haupt*, the ability to contest probable cause included the right to present evidence at a contested evidentiary hearing, which proceeding is recorded and subject to constitutional limitations. In view of these analogous facts, Petitioner, like the plaintiff in

Haupt, had the opportunity to challenge the finding of probable cause in the underlying criminal proceeding, but declined to do so. Collateral estoppel therefore applies to prevent Petitioner's re-litigation of this issue in the present action.

B. There Is No Reason For The Court To Review The Judgment Notwithstanding The Verdict On Petitioner's First Amendment Claim.

1. Petitioner Does Not Contend that The Ninth Circuit's Decision Regarding His First Amendment Claim Was Erroneous.

The District Court granted the Respondents' judgment notwithstanding the verdict on three grounds: (1) Petitioner's anonymous letter did not constitute protected speech, (2) French had qualified immunity; and (3) Petitioner failed to meet his burden of showing a causal connection between his anonymous letter and his termination to establish that the letter was a substantial or motivating factor. The Ninth Circuit affirmed on the third ground alone; it did not consider the other two bases of the District Court's opinion. (Petition for Writ of Certiorari, App. A, p. A-4.)

The determination of whether a causal nexus exists is fact-intensive and centers on the specific evidence offered in the case. The Ninth Circuit's decision in this matter has no broad public impact, does not create or reveal a conflict among jurisdictions, and does not present an important legal issue that is in need of resolution. Thus, there is no reason for the Court to grant review.

Petitioner, perhaps sensing that an evidentiary challenge does not meet the Court's considerations for granting review, has ignored the Ninth Circuit's decision

altogether. *He has not argued that the Ninth Circuit's decision was erroneous in any respect.* Instead, Petitioner spends roughly ten pages of his petition on the two issues that were not addressed by the Ninth Circuit: qualified immunity and whether his anonymous letter constituted protected speech. Because neither of these issues was a basis for the Ninth Circuit's decision, Petitioner's argument fails to address the considerations set forth in Rule 10. As discussed already with regard to Petitioner's malicious prosecution claim, Rule 10 requires a petitioner to demonstrate how a court of appeals' decision creates a basis for granting review; Rule 10 does not indicate that trial court decisions are a consideration on which a writ of certiorari will be granted.

2. The Ninth Circuit's Holding That The Evidence Was Not Sufficient To Support A Verdict Against Respondents Does Not Conflict With Other Decisions; The Ninth Circuit Did Not Misapply The Standard Of Review Of Judgments Notwithstanding The Verdict.

An appellate court reviews the propriety of a judgment notwithstanding the verdict under the same standard that is applied by a district court. *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987). The jury's verdict must be supported by substantial evidence in order to stand. *Id.*; *Transgo, Inc., v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985). A JNOV is appropriate if, when viewing the material evidence most favorable to the nonmoving party, there is no substantial evidence, or reasonable inferences therefrom, to sustain a verdict for the nonmoving party. *Venegas*, 831 F.2d at 1514.

Both parties agree that the standard enunciated in *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), provides the general framework for the analysis of Petitioner's First Amendment claim. Under this standard, a plaintiff must establish that the speech (1) is protected by the First Amendment and (2) was a substantial or motivating factor underlying the governmental official's adverse act. *Id.*, 429 U.S. at 287. If these elements are met, the employer then has the burden to show that it would have taken the same employment action even in the absence of the protected activity. *Id.*

Here, the Ninth Circuit correctly applied the foregoing principles and concluded that Petitioner had not established a causal link between his letter and French's conduct toward him, or between French's conduct and the Petitioner's damages. There was an absolute absence of evidence to support the jury's determination that French, as a result of the anonymous letter, engaged in conduct that proximately caused damages to Petitioner. Thus, Petitioner failed to meet his burden of showing that his speech was a substantial or motivating factor for French's actions.

At trial, Petitioner focused on conduct of French that occurred *before* Petitioner ever wrote his letter. The letter could not have been a factor in any of this conduct. Moreover, Petitioner offered no evidence that French engaged in any conduct having an effect on the Sheriff's disciplinary action against Petitioner after the letter. Petitioner offered no evidence that French participated in the investigation of the anonymous letter or in the resulting discipline. The only evidence offered by Petitioner was that French conveyed his supervisor's file to an investigator. But, no evidence showed that this act had any effect

on the disciplinary action that Sheriff Shields ultimately decided to take. In light of Petitioner's failure to present evidence supporting his claim, the Ninth Circuit correctly affirmed the District Court's judgment notwithstanding the verdict because the verdict was plain error as a matter of law.

The Ninth Circuit's decision is also consistent with those of other courts, which hold that a plaintiff must do more than merely show that he or she engaged in protected activity prior to some adverse employment decision. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 685, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996) (to prevail, the plaintiff must "prove more than the mere fact that he criticized the Board members before they terminated him"); *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 752-53 (9th Cir. 2001) (summary judgment for defendant employer proper where plaintiffs could not "create a genuine issue of material fact on the question of whether [the employer's] decision to recommend reassignment was motivated by their speech"); *Erickson v. Pierce County*, 960 F.2d 801, 805 (9th Cir.), *cert denied*, 506 U.S. 1035 (1992) (holding that judgment for the employer notwithstanding the verdict was appropriate because evidence of employer's knowledge of employee's political activity "simply does not support [plaintiff's] claim that her [political activity] was a substantial or motivating factor in [defendant's] decision to terminate her"); *O'Connor v. Chicago Transit Authority*, 985 F.2d 1362, 1368 (7th Cir. 1993) ("The mere fact that protected speech precedes an employment decision does not create the inference that the speech motivated the employment decision").

3. The District Court Applied The Correct Standard In Concluding That Petitioner's Speech Was Not Protected.

Under *Mt. Healthy, supra,* 429 U.S. at 287, a plaintiff must first establish that her speech is protected by the First Amendment. Two criteria must be fulfilled for a public employee's speech to be so protected: (1) the employee's speech must regard a matter of public concern; and (2) the employee's interest in expressing herself on this matter must outweigh the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Waters v. Churchill,* 511 U.S. 661, 668, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.,* 149 F.3d 971, 979 (9th Cir. 1998), *cert. denied,* 526 U.S. 1018 (1999).

The first ("public concern") criterion is a necessary, but not a sufficient, condition of constitutional protection. *See Brewster,* 149 F.3d at 979. If an employee's speech touches on a matter of public concern, a court must still weigh the speech interest against the employer's interest to determine whether the speech is constitutionally protected. *See Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Under this test, courts balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services that it performs through its employees." *Id.*

Petitioner agrees that the foregoing law is controlling, but argues that review is necessary to address the question of which factor weighs more heavily in determining whether an employee's speech concerns a matter

of public concern (the first criterion): the employee's motive in speaking or content of the speech itself. The law, however, needs no such clarification. The law is clear that the question of whether an employee's speech addresses a matter of public concern is determined by the content, form and context of the particular statement. *Connick v. Myers*, 461 U.S, 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). In this analysis, the content of the speech is the most critical factor. *Johnson v. Multnomah County*, 48 F.3d 420, 424-25 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995).

Petitioner also argues that the District Court improperly evaluated the veracity of the allegations in his anonymous letter (i.e., that they were recklessly and falsely made) in analyzing the "public concern" criterion. This argument misrepresents the District Court's decision. The court did not rest upon this first stage of analysis. Rather, the court assumed that the letter did concern a matter of public interest for the purpose of its analysis and then proceeded to the second criterion and balanced the competing interests. It was in the context of the *Pickering* balancing test that the District Court considered the reckless manner in which the Petitioner had knowingly asserted the false claims against French and Poythress. In this regard, the court stated: "[T]he falsity of the speech and whether it was made knowingly or with reckless disregard for the truth is a matter to be considered in applying the *Pickering* balance of interests." (Petition for Writ of Certiorari, App. D., p. D-9 to D-10.) The court's statement accords with legal precedent:

> Recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and

> the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.

Gilbrook v. City of Westminster, 177 F.3d 839, 866 n.14 (9th Cir.), *cert. denied*, 528 U.S. 1061 (1999) (quoting *Johnson*, 48 F.3d at 424).

4. The District Court Properly Relied On Reasonable Predictions Of Disruption In Balancing The Parties' Interests under *Pickering v. Board of Education*.

As indicated above, even when the speech is a matter of public concern, it still will not be protected if a plaintiff's interest in commenting on matters of public concern does not outweigh the interest of the defendant, as a public employer, in promoting effective and efficient governmental service. *See Pickering v. Board of Education*, *supra*, 391 U.S. at 568. Under this test, Courts consider: (1) whether the speech impeded the employee's ability to perform his responsibilities; (2) the importance of close working relationships with superiors and co-workers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose. *Connick*, *supra*, 461 U.S. at 151-54 (employing the *Pickering* test). Both parties agree that the *Pickering* factors supply the correct standard for resolving the current dispute.

The determination under *Pickering* of whether an employee's speech is constitutionally protected turns on "a context-intensive, case-by-case" inquiry. *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998). In balancing the employer's and employee's interests, an employer does not generally have to show actual disruption from

an employee's speech, but may rely on a reasonable prediction of disruption:

> [I]n executing the *Pickering* balance, courts should not require government employers to demonstrate that an employee's speech actually disrupted efficient office operation; rather, 'reasonable predictions of disruption' are sufficient.

Moran, 147 F.3d at 846 (quoting *Waters v. Churchill*, 511 U.S. 661, 673, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994)); *accord Keyser, supra*, 265 F.3d at 749 n.2.

Petitioner cites *Gilbrook v. City of Westminster, supra*, to argue that the Department had to show actual disruption. *Gilbrook* is distinguishable, and actually supports the Respondents' position. The *Gilbrook* court did not hold, as Petitioner implies, that a court may never presume disruption. Rather, the court stated:

> [A] prediction of disruption was [not] reasonable *in the unusual circumstances of this case.* The statement at issue in no way criticized the abilities of fellow firefighters or accused them of any wrongdoing. . . .
>
> As Defendant Demonaco conceded, the morale of firefighters already was badly damaged because of the budget cuts and the public accusations of corruption. In such circumstances, [Plaintiff] Garrison's statement could have had, at most, a marginal impact on firefighters' morale. Such a nominal showing of potential disruption is plainly inadequate to outweigh the heavy interests (1) of Garrison in speaking about the lack of readiness of the fire department and (2) of the citizens of Westminster in receiving such information.

Id., 177 F.3d at 869 (emphasis added).

Conversely here, Petitioner's statements did accuse fellow Sheriff's Department supervisors of criminal

wrongdoing and there was no evidence that morale of the Sheriff's Department was already damaged. Furthermore, *Gilbrook* did not involve law enforcement authorities, as here, whose interest in avoiding disruption is higher than other governmental employers:

> [T]here is a particularly urgent need for close teamwork among those involved in the "high stakes" field of law enforcement. Speech that might not interfere with work in an environment less dependent on order, discipline, and esprit de corps could be debilitating to a police force. Such considerations are permissible in weighing constitutional violations.

Breuer v. Hart, 909 F.2d 1035, 1041 (9th Cir. 1990); *see also Kelley v. Johnson*, 425 U.S. 238, 246, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976) (recognizing that police departments have the "overall need for discipline, esprit de corps, and uniformity").

Thus, the general rule applied, and a reasonable prediction of disruption was sufficient. Here, the Respondents' showing of potential disruption clearly outweighed Petitioner's limited interest, if any, in spreading spurious accusations that he knew were false. The potential for disruption was high given the false nature of his accusations. Petitioner admitted as much at trial, where he testified that his authority had been previously undermined in the same way that he was attempting to impugn Respondent French's authority:

Q: You complained of a deputy spreading gossip about you, did you not?

A: [Petitioner:] Yes sir.

Q: You felt that it was undermining your authority, did you not?

A: I did.

Q: And yet, . . . in the anonymous letter, you're distributing gossip, are you not?

A: Yes, sir.

(Trial Transcript, p. 132.)

5. The District Court Properly Considered Respondent French's Particular Conduct In Concluding That He Was Immune from Suit.

Petitioner misrepresents the proper standard for evaluating a claim of qualified immunity. Petitioner argues that the District Court erred in finding that Respondent French had qualified immunity because "[n]o reasonable public official would think reporting illegal conduct on the part of candidates for sheriff would not be subject to protection." (Petition, p. 30.) This argument misapplies the relevant case law by focusing on abstract principles rather than on French's specific conduct.

Qualified immunity protects police officers from Section 1983 liability for performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). To be considered "clearly established" for the purposes of qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The analysis focuses on the right in its "particularized" sense, not in its general or abstract sense. *See id.* In other words, "the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being

challenged." *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1992); *accord Kelly v. Borg*, 60 F.3d 664, 667 (9th Cir 1995) ("Broad rights must be particularized before they are subjected to the clearly established test").

In making this inquiry, courts employ the *Pickering* test. This test "depends upon the sensitive ad hoc balancing" of the specific facts of each case. *Moran, supra*, 147 F.3d at 845. *Pickering* "requires a fact-sensitive, context-specific balancing of competing interests[.]" *Gilbrook, supra*, 177 F.3d at 867.

The District Court's disposition of the case is in accord with the foregoing principles because the court focused on French's particular conduct when it balanced the parties' interests. On the one hand, the evidence showed that Petitioner knowingly spread false rumors about supervisors who had been critical of his performance because he believed it would help him protect his job. On the other hand, the uncontroverted evidence demonstrated that *French's only action in response to the letter was to share his supervisor's file with an investigator*, which was routinely done in the department as part of the disciplinary process. This was the extent of French's role in Petitioner's discipline. In this context, the District Court correctly concluded that French acted lawfully and did not violate Petitioner's "clearly established" constitutional rights by producing the file.

C. Petitioner's Purported Grounds For Granting Review Are Inapplicable.

Petitioner cites *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), and argues that the Court should accept review to provide guidance on the constitutional basis for bringing a malicious prosecution

action under Section 1983. Petitioner's argument is misplaced because the present case does not involve this question. Neither the District Court nor the Ninth Circuit addressed the issue discussed in *Albright*. Thus, the instant action offers an insufficient record on which to address these concerns because the dismissal of Petitioner's malicious prosecution claim was based on other grounds. As discussed above, the District Court's dismissal, and the Ninth Circuit's affirmance, were based on Petitioner's failure to show the absence of probable cause, which was an essential element of his malicious prosecution claim. Both the decision of the District Court and of the Ninth Circuit were factually-focused and followed settled law.

Petitioner also cites three Ninth Circuit cases, *Moran v. Washington, supra, Gilbrook v. Westminster, supra,* and *Keyser v. Sacramento City Unified Sch. Dist., supra,* in arguing generally that additional guidance is needed regarding qualified immunity. However, the present matter presents no such issue. The law relied on by the District Court is clear. The District Court employed the *Pickering* balancing test to weigh the parties' interests. Viewing Petitioner's right in its "particularized" sense as required by settled law, *see Anderson v. Creighton,* 483 U.S. at 640, the court concluded that, under the facts and circumstances of this case, French could have reasonably believed that providing a supervisor's file to the person making a disciplinary recommendation does not violate clearly established law.

D. Other Reasons Why Review is Unnecessary.

There was no dissent in the Ninth Circuit's decision. The Ninth Circuit denied Petitioner's request for reconsideration, and declined his request for a rehearing en banc. The Ninth Circuit does not perceive an inconsistency with its own decisions or those of other federal courts. Both the Ninth Circuit's decision and that of the District Court were unpublished, which indicates that neither court believed the present case has any precedential value.

CONCLUSION

There is no reason for the Court to grant further review. This matter does not present an important issue of law which has not been decided. It does not present a conflict between different circuits of the courts of appeal or a conflict between the Ninth Circuit's decision and a decision of this Court. The legal principles pertinent to Petitioner's malicious prosecution and First Amendment claims are well settled. The Ninth Circuit's (and the District Court's) decision in this case is based upon the factual record and insufficiency of Petitioner's evidence. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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